

## HOUSE BILL NO. 258

INTRODUCED BY D. WANZENRIED

A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING A BOARD OF TRUSTEES OF A SCHOOL DISTRICT TO ADOPT A POLICY ESTABLISHING AN INDIAN EMPLOYMENT PREFERENCE FOR POSITIONS IN THE SCHOOL DISTRICT; RANKING THE PREFERENCE FOR INDIAN APPLICANTS OVER OTHER PREFERENCE-ELIGIBLE APPLICANTS WITH SUBSTANTIALLY EQUAL QUALIFICATIONS FOR SCHOOL DISTRICT EMPLOYMENT ONLY; EXEMPTING THE INDIAN EMPLOYMENT PREFERENCE FROM EMPLOYMENT DISCRIMINATION LAWS; AMENDING SECTIONS 39-30-201 AND 49-2-303, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

WHEREAS, as part of the state's educational guarantees, the people of Montana in 1972 included Article X, section 1(2), in the state's Constitution, recognizing the distinct and unique cultural heritage of American Indians and expressing the state's commitment to preserving that cultural integrity through education; and

WHEREAS, a 1995 study of Article X, section 1(2), by the Legislature's Indian Affairs Committee (now State-Tribal Relations Committee) reported that in addition to the failure of school districts and individual schools to include in their curricula courses recognizing the cultural heritage of American Indians, the small number of Indian teachers and administrators in public schools resulted in Indians and students having few role models and contributed to a dropout rate among Indian students significantly higher than that of non-Indian students; and

WHEREAS, the 1995 study also revealed that non-Indian students had little or no knowledge or understanding of the impact of Montana's Indian people on the state's history nor of an understanding of contemporary Indian culture and the legal status of tribal governments and courts; and

WHEREAS, in response to the 1999 Legislature's enactment of the "Indian Education for All Act", the Board of Public Education integrated American Indian studies into some of the K-12 accreditation standards; and

WHEREAS, despite these efforts, data collected by the Office of Public Instruction for the 2001-2002 school year revealed that American Indian students, who represented only 9.3% of the total high school population, comprised 24.4% of the total number of students that dropped out of high school prior to graduation; and

WHEREAS, the dropout rate of American Indian students in grades 7 and 8 for the 2001-2002 school year was 12 times that of non-Indian students and 3 times the rate of non-Indian students attending high school; and

WHEREAS, from 1991 through 1997, the Office of Public Instruction reported that while non-Indian students had a graduation rate of 82%, the graduation rate for American Indian students over the same 6-year period was only 56%; and

WHEREAS, the United States Supreme Court, in *Morton v. Mancari*, 417 U.S. 535 (1974), held that an Indian employment preference for federal employment did not violate the equal protection guarantees of the federal Constitution because the laws affording special treatment to Indians are rationally tied to the fulfillment of the unique federal obligation toward Indians; and

WHEREAS, in 2002, the Montana Supreme Court, in *State v. Shook*, 313 Mont. 347, 67 P.3d 863 (2002), adopted the *Mancari* rationale, ruling that the State of Montana "is required to follow this federal precedent by the express terms of both our own Constitution and the federal enabling act establishing Montana as a state"; and

WHEREAS, the Montana Supreme Court in *Shook* also declared that "federal Indian law regarding the rights of Indians is binding on the state" and that "the state equal protection guarantee under Article II, Section 4, must allow for state classifications based on tribal membership if those classifications can rationally be tied to the fulfillment of the unique federal, and consequent state, obligation toward Indians"; and

WHEREAS, authorizing a school district to adopt or amend a policy to provide a preference for employment with the school district to an Indian who has substantially equal qualifications for the position does not violate the equal protection guarantees of Article II, section 4, of the Montana Constitution, and can be tied rationally to the fulfillment of the state's special obligation and commitment to educate Indian and non-Indian students as part of the implementation of Article X, section 1(2), of the Montana Constitution.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**NEW SECTION. Section 1. Indian hiring preference for school district employment authorized.**

(1) A school district may adopt or amend a policy providing a preference for employment with the school district to an Indian who has substantially equal qualifications for the position.

(2) A challenge related to the failure of a school district to comply with a policy adopted under this

1 section is a controversy within the meaning of 20-3-210 and must be reviewed as provided in 20-3-107 and  
2 20-3-210.

3 (3) In an initial hiring, a school district that has adopted or amended a policy under this section shall hire  
4 a person who is Indian over any other preference-eligible applicant with substantially equal qualifications.

5 (4) For the purposes of this section, the following definitions apply:

6 (a) "Indian" means a person who is enrolled or who is a second degree lineal descendant of a person  
7 enrolled upon an enrollment listing of a recognized Indian tribe domiciled in the United States.

8 (b) "Position" means a vacant permanent, temporary, or seasonal employed position when filled by the  
9 school district. The term does not include:

10 (i) a school superintendent;

11 (ii) a district clerk;

12 (iii) appointment by an elected official to a body, including but not limited to a board, commission, or  
13 council;

14 (iv) appointment by an elected official to a public office if the appointment is provided for by law; or

15 (v) engagement as an independent contractor or employment by an independent contractor.

16 (c) "Substantially equal qualifications" means the qualifications of two or more persons between whom  
17 the school district board of trustees cannot make a reasonable determination that the qualifications held by one  
18 person are significantly better suited for the positions than the qualifications held by the other person or persons.

19  
20 **Section 2.** Section 39-30-201, MCA, is amended to read:

21 **"39-30-201. Employment preference in initial hiring.** (1) (a) Except as provided in 10-2-402, in an  
22 initial hiring for a position, if a job applicant who is a person with a disability or eligible spouse meets the eligibility  
23 requirements contained in 39-30-202 and claims a preference as required by 39-30-206, a public employer shall  
24 hire the applicant over any other applicant with substantially equal qualifications who is not a preference-eligible  
25 applicant.

26 (b) ~~Except for an initial hiring by a school district pursuant to [section 1],~~ a public employer shall, in  
27 an initial hiring, hire a person with a disability over any other preference-eligible applicant with substantially equal  
28 qualifications.

29 (2) The employment preference provided for in subsection (1) does not apply to a personnel action  
30 described in 39-30-103(2)(b) or to any other personnel action that is not an initial hiring."

1  
2       **Section 3.** Section 49-2-303, MCA, is amended to read:

3       **"49-2-303. Discrimination in employment.** (1) It is an unlawful discriminatory practice for:

4           (a) an employer to refuse employment to a person, to bar a person from employment, or to discriminate  
5 against a person in compensation or in a term, condition, or privilege of employment because of race, creed,  
6 religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the  
7 reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex  
8 distinction;

9           (b) a labor organization or joint labor management committee controlling apprenticeship to exclude or  
10 expel any person from its membership or from an apprenticeship or training program or to discriminate in any  
11 way against a member of or an applicant to the labor organization or an employer or employee because of race,  
12 creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex  
13 when the reasonable demands of the program do not require an age, physical or mental disability, marital status,  
14 or sex distinction;

15           (c) an employer or employment agency to print or circulate or cause to be printed or circulated a  
16 statement, advertisement, or publication or to use an employment application that expresses, directly or  
17 indirectly, a limitation, specification, or discrimination as to sex, marital status, age, physical or mental disability,  
18 race, creed, religion, color, or national origin or an intent to make the limitation, unless based upon a bona fide  
19 occupational qualification;

20           (d) an employment agency to fail or refuse to refer for employment, to classify, or otherwise to  
21 discriminate against any individual because of sex, marital status, age, physical or mental disability, race, creed,  
22 religion, color, or national origin, unless based upon a bona fide occupational qualification.

23           (2) The exceptions permitted in subsection (1) based on bona fide occupational qualifications must be  
24 strictly construed.

25           (3) Compliance with 2-2-302 and 2-2-303, which prohibit nepotism in public agencies, may not be  
26 construed as a violation of this section.

27           (4) The application of a hiring preference, as provided for in 2-18-111, ~~and 18-1-110,~~ and [section 1],  
28 may not be construed to be a violation of this section.

29           (5) It is not a violation of the prohibition against marital status discrimination in this section:

30           (a) for an employer or labor organization to provide greater or additional contributions to a bona fide

1 group insurance plan for employees with dependents than to those employees without dependents or with fewer  
2 dependents; or

3 (b) for an employer to employ or offer to employ a person who is qualified for the position and to also  
4 employ or offer to employ the person's spouse."

5  
6 **NEW SECTION. Section 4. Notification to tribal governments.** The secretary of state shall send a  
7 copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell  
8 band of Chippewa.

9  
10 **NEW SECTION. Section 5. Codification instruction.** [Section 1] is intended to be codified as an  
11 integral part of Title 20, and the provisions of Title 20 apply to [section 1].

12  
13 **NEW SECTION. Section 6. Effective date -- applicability.** [This act] is effective on passage and  
14 approval and applies to contracts for employment offered on or after [the effective date of this act].

15 - END -